IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

SUIT NO.581 OF 1984

Smt.Shamina Amirali Mukadam ..Plaintiff.

Vs.

The New India Assurance
Company Ltd. ..Defendants.

Mr.Harshad Trivedi, Advocate for the Plaintiff.

Mr.F.P.Dubash with Ms.Ranjita Pore i/b.M/s.Mulla & Mulla, Advocate for the Defendants.

CORAM: S.J. VAZIFDAR, J.
DATED: 3RD AUGUST, 2004

ORAL JUDGMENT :

The Plaintiff has filed the suit to recover an amount of Rs.2,50,000/- together with interest in respect of an insurance claim.

2. The Plaintiff's case is that she was the owner of a motor vessel "Maimoona" (AL RIYAZ). In respect of the vessel the Defendant had issued a policy of insurance coverage under Policy No.822912009. The vessel was loaded at Porbunder with cargo and consigned to M/s.Snowcem India Limited. The cargo was declared to be of the value of Rs.2,37,600/-. The vessel sailed from Porbunder Port on 27th

November, 1981 at about 1500 hours. She sailed upto Suratbari on 29th November, 1981. The vessel ran into heavy and stormy weather and was damaged. Its sails were broken and leaks sprang in the vessel and water entered inside from all sides. Help was sought but was not forthcoming as a result whereof the vessel sunk near Madwad Light House on 30th November, 1981 at 16.00 hours. The Plaintiff was able to save the machine and other parts only to the extent of the value of Rs.34,000/. The vessel was a total loss. The Plaintiff arranged for a survey by an independent surveyor M/s.Mathuradas Damodar & Company who made their survey report dated 27th July, 1982.

The Plaintiff's further case is that she informed the Defendant of the same and requested them to pay the amount under the aforesaid policy of insurance. According to the Plaintiff, the Defendant wrongly refused to make payment on the ground that the Plaintiff had not paid the insurance premium on time. As the Defendant refused to make payment, the Plaintiff was constrained to file the above suit.

3. The above, in short, was the Plaintiff's case in the plaint prior to its amendment. Pursuant to an

order dated 11th June, 2003 the Plaintiff amended the plaint substantially. By the amendment, the Plaintiff set out the procedure, according to her, involved in issuing an insurance policy. She contended that due to the monopoly in insurance business the insured has no choice to discuss or bargain the terms of the insurance policy; that the printed proposal forms are prescribed; the insurers appoint agents; the agents contact the insured and the said printed forms are given to the insured which the insured has to fill in and submit. The Defendant then scrutinizes the said proposal form, makes enquiries and then informs the insured the premium due. In the present case, the insured had to comply with the provisions of Marine Insurance Act as it covers a sea-going vessel. After making the necessary enquiries, the Defendant issued a policy for the year 1981-82 stating the value to be Rs.2,50,000/-.

The Defendant had agreed to the payment of premium by instalments. The Plaintiff’s case is that she paid the first two instalments of the premium. It is contended in the amendment that the Defendant is not entitled to alter the amount of premium fixed

once a contract is concluded. The contention really is unfounded for it is not even the Plaintiff's case that the Defendant altered the amount of premium. To continue with the Plaintiff's case, she stated that the third and fourth instalments of the premium were forwarded under a covering letter dated 26th November, 1981. She states that the same "must have" been received by the Defendant by the end of November, 1981. She alleged that the Defendant was informed that the vessel was lost due to the perils of the sea by a telegram dated 2.11.1981. The Defendants, however, thereafter, by their letter dated 20th May, 1982 rejected the Plaintiff's claim and returned the cheque. In this letter, the Defendants stated that they received the Plaintiff's said letter dated 26th November, 1981 on 4th December, 1981 i.e. after the vessel was lost. The Defendant's contention therefore was that the vessel was not insured on the date on which it was lost. The Plaintiff's case therefore is that she had made no default in the payment of the premium. The conduct that she refers to in this regard is the acceptance of the premium paid by her and the appointment of the said surveyors. It is important at this stage to note that in the amended paragraph

7A of the plaint the Plaintiff has expressly relied upon clause 3 of the said policy in support of her case. I will deal with the importance of the reliance upon the clause in the policy later.

4. I will now deal with the Defendant's case as stated in the written statement. The Defendants admit that the proposal was received for insuring the vessel against risk inter-alia of total loss effective from 19th February, 1981 to 18th February, 1982. The premium was worked out at 4% for risk, covering total loss and an additional 1% for risk covering partial loss aggregating to 5% of the value declared in the proposal form. The value declared in the proposal form was Rs.2,50,000/-. The premium payable at 5% thereon was Rs.12,500/-. In addition thereto, a stamp fee of Rs.62.50 was also payable. The Defendants admit that they granted the Plaintiff the facility of paying the premium in instalments under the instalment facility. The Plaintiff was required to pay 40% of the premium amount as and by way of the first instalment of premium. Alongwith the first instalment, stamp fee of Rs.62.50 was also payable. Accordingly, the first instalment aggregating to Rs.5,062.50 was payable. As against

this, the Plaintiff paid a sum of Rs.4,387.50 in respect whereof a receipt No.439974 dated 19.2.1981 was issued by the Defendant. There was thus a short payment by Rs.675/-.

The second, third and fourth instalments comprising of 20% each of the total premium were payable every three months after the payment of the first instalment. Each of these instalments therefore amounted to Rs.2,500/- payable on 19.5.1981, 19.8.1981 and 19.11.1981. There was a short-payment of the second instalment inasmuch as the Plaintiff paid only Rs.2,175/- in respect whereof the Defendant issued a receipt dated 22.5.1981. The short-fall was of Rs.325/-. The third instalment was not paid on its scheduled date i.e. 19.8.1981. Nor was the fourth instalment paid on the scheduled date i.e. 19.11.1981. The Defendant alleged that it received a cheque in the sum of Rs.4,387/- from the Plaintiff towards the third and fourth instalments only on 4.12.1981. Under the cover of the same, the Defendant admits having issued a receipt dated 5.12.1981 in respect thereof. It was issued subject to encashment of the cheque. The payment towards the third and fourth instalment was therefore short by

Rs.612.50. The Defendant's case therefore is that the Plaintiff made a short-payment aggregating to Rs.1,612.50. The Defendants admit having allotted the said policy but stated that the same was not collected by the Plaintiff as she had failed to pay the premium in accordance therewith.

5. In the written statement the Defendant has also raised a defence based on clause 2 of the said policy which I shall deal with while referring to the arguments. It is important only to mention that the clause has been specifically referred to and set out in the written statement. It may be mentioned at this stage that despite the plaint having been amended substantially thereafter nothing is said as to this clause. The importance of this will become clear later. The Defendant has denied that it waived the non-payment of the premium in accordance with the said policy. The Defendant has also denied that it had anything to do with the survey or the genuineness or the authenticity of the survey report. It is not necessary at this stage to set out the various other contentions in the written submission as I shall be dealing with the same when I come to the merits of the case.

6. On 13th November, 2003 D.G.Deshpande, J. framed the following issues :

1. Whether the Plaintiff's letter dated 26th November 1981, together with a cheque for a sum of Rs.4,387.50 drawn on the Defendant towards payment of the 3rd and 4th instalments of the premium amount was in fact received by the Defendant by the end of November 1981, as stated in paragraph 7A of the plaint ?

2. Whether the Plaintiff paid the 4 instalments of the premium amount as per the terms of the Insurance Policy ?

3. Whether the Defendants were at any risk under the Insurance Policy as on 30th November 1981 viz. the date on which the insured vessel sank ?

4. Whether the value of the salvaged machine and other parts of the said vessel recovered by the Plaintiff was estimated to be around Rs.34,000/-

as stated in paragraph 2 of the plaint ?

5. Whether the Plaintiff is entitled to any claim from the Defendant under the Insurance Policy or otherwise ?

6. Whether Defendants prove that the Plaintiff committed breach of terms of policy by not paying the premium in time and therefore not liable to pay the claim ?

7. Whether Defendants prove that by accepting the premium amount afterwards did not waive the breach, and not estopped from denying their liability under policy and law ?

8. What order ?

7. The Plaintiff did not examine herself. On behalf of the Plaintiff, her husband and constituted attorney Amirali Alimchand Mukadam, was examined. The Defendants did not lead any evidence. Mr.Trivedi, the learned counsel appearing on behalf of the Plaintiff filed an affidavit dated 21st June

2004 of the witness in lieu of his examination-in-chief.

8. The witness has deposed in his affidavit that the Defendant had insured the said vessel in the sum of Rs.1,00,000/- for the period 12.10.1980 to 11.10.1981. The insurance policy was relied upon by him and marked in evidence. The insurance policy indicates that the actual period was from 12.2.1980 to 11.2.1981. Nothing however turns on this mistake. According to him, thereafter improvements were carried out in respect of the vessel as a result whereof the value of the vessel increased. The surveyors valued the vessel thereafter at Rs.2,50,000/-. The Defendants accepted the report. The witness has deposed that the Plaintiff was asked to pay the premium in four instalments of Rs.4,387/-, Rs.2,175/-, Rs.2,175/- and Rs.2,175/-. He deposed that by accepting the premium the Defendant had waived the breach comprising of the late payment of the premium. For the first time, on behalf of the Plaintiff, it is alleged that as the policy was not issued, the Defendants had not brought to the notice of the Plaintiff the conditions of the policy and that it cannot therefore be stated that the Plaintiff

committed any breach thereof. It was alleged that the policy used to be furnished by the Defendants to make the Plaintiff aware about the terms and conditions and that as the same was not furnished, the Defendant cannot repudiate the claim on the ground of breach. The witness thereafter deposed to certain facts regarding the circumstances in which the surveyor was appointed. The Plaintiff's case in this regard is contradictory as I shall demonstrate. The witness has in paragraph 17 of his affidavit alleged that the Defendants' underwriting officer informed him that the Plaintiff would have to pay a total premium of Rs.10,950/- in four instalments of Rs.2,175/- each.

ISSUE NOS.1, 2, 3, 6 AND 7

9. I must preface the judgment on these issues by first dealing with the scope of the Plaintiff's case regarding the insurance policy itself.

Mr.Trivedi sought to contend that as the policy was not furnished to the Plaintiff by the Defendant

the Plaintiff was unaware of the terms and conditions thereof. According to him, the Plaintiff cannot be held liable for any alleged breach thereof by her.

10. Factually, the submission is unfounded. It is contrary to the Plaintiff's case. In the plaint as originally filed, the Plaintiff specifically referred to the said policy. She never contended that she was unaware of the terms and conditions thereof. She never contended that the Defendants refused to furnish her the details of the policy. It is true that the policy itself was not furnished but that is a different matter from whether or not the Plaintiff was made aware of and had accepted the terms and conditions thereof. The Defendant is entitled under section 54 of the Marine Insurance Act to withhold the actual policy till the full premium is paid. Section 54 of the Marine Insurance Act reads as under :

> "**S.54. When premium payable.-**Unless otherwise agreed the duty of the assured or his agent to pay the premium, and the duty to the insurer to issue the policy to the assured or his agent, are concurrent conditions, and the insurer is

> not bound to issue the policy until payment or tender of premium."

11. It is clear, therefore, that the actual policy is not liable to be handed over by the Defendant to the Plaintiff until payment of the premium is made. Admittedly, the premium was not paid at the time of the policy. In paragraph 1 of the plaint, the Plaintiff states that the Defendant had issued a policy of insurance and she craves leave to refer to and rely upon the said policy when produced. In paragraph 6 of the plaint the Plaintiff supported what is stated by her in the correspondence viz. that the Defendants ought to pay the amounts "under the policy of insurance". It is not her case in the plaint that after the Defendant agreed to insure the said vessel for the period between 19.2.1981 and 18.2.1982 the Defendant altered any of the terms and conditions of the policy. Indeed, it does appear that except the value of the insured vessel the terms and conditions of the fresh policy were that of the earlier policy. Even in the amended plaint, apart from general observations regarding the rights of the Defendant, there is no averment as to how exactly the Defendant had altered the terms and conditions of the

policy. In fact, in paragraph 1A the Plaintiff states that the normal procedure is that the printed forms are prescribed by the Defendant, their agents contact the insured persons and give the printed proposal form which the insured has to submit and that the Defendant after scrutinizing the same and making its enquiries agrees to insure the vessel on payment of the premium to be determined. The Plaintiff has not stated that in this case the terms and conditions were never brought to her notice. She has not stated that she was unaware of the same. Even in the examination-in-chief the witness does not allege anything to this effect.

12. In this background, it is necessary to examine the Defendant's defence based on clause 2 of the said premium instalment clause which reads as under :

> "2. Notwithstanding the provisions of the preceeding clause, upon non payment of any instalment on its due date, the whole of the amount of premium of the balance as the case may be shall become immediately due and payable and without prejudice to the right of the insurer to recover the same, this policy, from the time and date of the default in payment of instalment shall cease to operate, and as from that time

> no liability shall attach to the insurer under the policy, nor shall any claim arising hereafter be entertained or be payable under the policy."

13. To reiterate, the Plaintiff did not in the original plaint state that the clause was not a part of the insurance policy. I will assume that it was not necessary for her to state the same in the plaint when it was filed. However, the written statement was filed on 23.4.1989. As stated above, in paragraph 1(i) of the written statement the clause has been set out verbatim. For 13 years the Plaintiff did not in any manner whatsoever allege either in the correspondence or in any pleading that the sub-clause (2) of the premium payment clause was not one of the terms and conditions of the insurance policy. What is even more important is that in July, 2003 the Plaintiff amended the plaint extensively. Even in the amended plaint the Plaintiff has not denied the existence of the said clause.

14. This then requires for consideration the effect of clause of sub-clause 2. I will for the moment assume that the Defendants accepted the premium which has been paid belatedly. I will even assume the

Plaintiff's case that the payment of the third and fourth instalment of the premium was accepted by the Defendant after the vessel was lost and that the Defendants had knowledge of the loss of the said vessel. The same would made no difference whatsoever. Under sub-clause 2 the Defendant was entitled to do so without affecting its rights in any manner whatsoever. The clause is clear. Under the clause, the Defendant is entitled to recover any balance amounts due and payable towards premium. Further, in the event of any default in the payment of the premium the whole of the amount of premium or the balance as the case may be, shall become payable immediately. The consequence of non-payment of premium in terms of the policy is that from the time and the date of the default, the policy shall cease to operate and as and from that time, no liability shall attach to the Defendant under the policy. Nor shall any claim arising thereafter be entertained or be payable under the policy. Thus, the effect of the policy ceasing to operate and the Plaintiff's rights to recover the balance premium are independent of each other and without prejudice to each other. In other words, not only does the policy cease to operate upon the default in the payment of premium

but further in such event the Defendant is also entitled to recover the balance premium payable.

15. That the Plaintiff was aware of sub-clause 2 of the premium instalment clause is evident from the correspondence between the parties as well. In Exhibit PW-2/L, the Defendant by a letter dated 20.5.1982 specifically raised the same defence and while doing so, set out clause 2 verbatim. The Plaintiff, in her letter dated 2nd September, 1982 did not deny the existence of clause 2. She, in fact, stated that the premium instalments were paid in time. In a further letter dated 25.6.1983 at Exhibit PW-2/M, the Plaintiff did not deny sub-clause 2 of the premium instalment clause. Finally, the Plaintiff's Advocate's letter dated 3rd October, 1983 (Exhibit PW-2/N) specifically calls upon the Defendant to make payment under the policy issued by it. The entire letter refers to the policy of insurance.

16. The Plaintiff has not examined herself. This is specially important on the question of the existence of sub-clause 2 between the parties. It was necessary for her to have stepped into the witness

box and alleged that she was not aware of the said clause or that she was not made aware of the same. In the absence thereof, an adverse inference must be drawn against her to the effect that she was aware of and considered herself to be bound by the terms of the policy including the said sub-clause 2 of the premium instalment. As I have noted earlier, in paragraph 7(a) of the plaint, the Plaintiff, in fact, specifically refers to clause 3 of the said policy. There is no reason why I ought to accept Mr.Trivedi's case that the Plaintiff was unaware of sub-clause 2.

17. In this view of the matter, it really makes little difference whether the payments were received by the Defendants belatedly or not. There can really be no question of waiver. The mere acceptance of the premium which has been paid belatedly or paid short would not constitute a waiver on the part of the Defendants. That the instalments in respect of the premium were paid belatedly is admitted and as I shall presently demonstrate, even the quantum was short.

18. The witness, in his cross-examination has deposed as under :

> "38. I am aware that the premium is to be paid in quarterly instalments. The first instalment was payable and was in fact paid on 19th February, 1981. The subsequent instalments were payable on 19th May, 1981, 19th August, 1981 and 19th November, 1981."
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> "39. It is true that the premium is worked out at a percentage of the value of the sum insured. I believe that in 1980-81, the premium was 1% for part cover and 4% for a wider cover. This percentage was applicable for this vessel even for the year 1981-82."

19. The above cross-examination establishes beyond doubt that on the Plaintiff's own case the Defendant's case regarding the quantum and of the dates of payments of the instalments is correct. Subsequently, when Mr.Dubash, the learned counsel appearing on behalf of the Defendant confronted the witness with his statement in his affidavit in lieu of the examination-in-chief to the effect that the Plaintiff was asked to pay premium in four instalments of Rs.4387.50, Rs.2175/-, Rs.2175/- and Rs.2175/- he stated "the Defendant asked the Plaintiff to make the payment of the aforesaid amount". On further cross-examination, he stated

that the instructions from the Defendant to make the aforesaid payment were in writing. He however stated that he was not in possession of the writing. He further stated that he would not be able to produce the writing as he was not in possession of the same.

20. It is difficult to believe the witness's testimony. The Plaintiff has not even examined herself. There is nothing on record that substantiates the Plaintiff's case regarding the quantum of instalments. There is nothing on record from which the quantum alleged by the Plaintiff is even logically deducible. It is no wonder that the Plaintiff is not even in possession of the written statement. In my view, considering the witness's evidence, it is not possible that any such instructions were ever given. It is thus clear that there was a short-fall in the payment of the first instalment.

21. The amount allegedly paid towards the third and fourth instalment was Rs.4387.50. This, according to the witness, in paragraph 41 of the cross-examination, constituted 40% of the amount of premium. But, 40% would come to Rs.5,000/-. When

confronted with this aspect, he stated in his cross-examination that this was done pursuant to written instructions from the Defendant to do so subsequently. Once again, he was unable to produce these alleged written instructions. The figure of Rs.4387.50 makes little sense. It corresponds neither to the actual amount payable viz. Rs.5000/- nor to the Plaintiff's own case. The only manner in which the Plaintiff sought to explain this breach was by stating through her witness that the Defendant issued such instructions. The Plaintiff has not examined herself. The Plaintiff has not produced an iota of evidence to substantiate the case.

22. Finding himself in a bind, the witness thereafter in cross-examination stated that there was no schedule of payment. He expressly agreed that this was stated by him because the insurance policy was not furnished by the Defendant to the Plaintiff. He further went on to state that the alleged writing (which he was unable to produce) specified a date for making payment of the instalments. I am afraid, the witness is not quite honest in this regard. Even here he does not state that the Plaintiff was not aware of the terms and conditions of the policy.

23. Mr.Trivedi tried to persuade me to discard the witness's evidence altogether and merely proceed on the basis that the insurance policy not having been physically handed over to the Plaintiff, I should hold that there was no scheduled date for the payment of the instalments. I am unable to agree. The submission is contrary to the Plaintiff's case in the plaint. It is contrary to the Plaintiff's witness's statements in the cross-examination. It is contrary to the entire evidence. The improvement of the witness's case is only after he found that it had been established by the cross-examination beyond doubt that there was a breach on the part of the Plaintiff in the payment of the premium both as regard the time and quantum.

24. The falsity of this case is also clear from the further cross-examination. In paragraph 43, the witness was confronted with a letter dated 2.9.1982 (Exhibit P-2/L-1) in which it is stated: *"This time, the vessel was kept in Porbunder due to monsoon period, and there was no any other income to pay the dues in time"*. The witness in cross-examination stated that he did not know what the Plaintiff meant

by stating that the dues were not paid in time. He therefore stated that he was unable to explain the same.

Firstly, this would not support the Plaintiff at all for the Plaintiff did not examine herself. The statement indicated that even according to the Plaintiff, there was a certain time schedule for the payment of premium and a statement on her part that the time schedule had not been met by her. Secondly, the answer given by the witness was clearly evasive. In paragraph 57 of his cross-examination he stated that the entire correspondence carried out in the name of the Plaintiff was prepared by him and that he was aware of the contents thereof. The aforesaid answer therefore was clearly incorrect to say the least.

25. Mr.Trivedi submitted that by accepting the instalments of premium paid by the Plaintiff, the Defendant had waived its rights in respect of the alleged breach in payment. He relied upon section 35(1) and 36(3) of the Marine Insurance Act, 1963. Section 35(1) and 36(1) and (3) read as under :

> "**S.35.Nature of warranty.**-(1) A warranty, in the following sections relating to warranties, means a promissory warranty, that is to say a warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particulars state of facts."
>
> "**S.36.When breach of warranty excused.**-(1) Non-compliance with a warranty is excused when, by reason of a change of circumstances, the warranty ceases to be applicable to the circumstances of the contract, or when compliance with the warranty is rendered unlawful by any subsequent law.
>
> (2).....
>
> (3) A breach of warranty may be waived by the insurer."

The undertaking to pay the premium is a warranty that it shall be paid as required by the policy of insurance . Thus, the payment of premium is a warranty as contemplated by section 35(1) of the Marine Insurance Act, 1963. Under section 36(3) a breach of this warranty may be waived by the insurer, the Defendant.

26. I will deal with Mr.Trivedi’s submission

regarding waiver. There is however another hurdle in the Plaintiff's case. My conclusion on this aspect also renders it unnecessary to go into the question of waiver. I have reproduced the witness's cross-examination in paragraphs 38 and 39 of the evidence. In paragraphs 39, the witness has admitted that the premium was worked out at the percentage of the value of the sum assured. He further admitted that the premium for the year 1981-82 was the same as for the year 1980-81. The premium therefore, according to him, was 5% of the insured value of the vessel. The insured value of the vessel was Rs.2,50,000/-. The premium therefore at 5% is Rs.12,500/-. In addition thereto, stamp fee of Rs.62.50 was payable. Admittedly, the Plaintiff has paid towards premium, amounts of Rs.4387.50 on 19.2.1987, Rs.2175/- on 22.5.1981 and Rs.4387.50 by its cheque dated 26.11.1981 (the date of receipt of the last payment is in dispute). Thus, the aggregate amount paid is Rs.10,950/-. Thus, the Plaintiff has paid only a sum of Rs.10,950/- against the admitted amount of Rs.12,500/-. Thus, admittedly, the entire premium was not even paid.

27. Even if it were to be held that the terms and

conditions in the said insurance policy were not binding on the parties in view of the fact that the same was not forwarded to the Plaintiff, it would not take the Plaintiff's case any further. For in that event, there is no contract of insurance between the parties in respect whereof the parties were ad-idem. Receipt of the money would at the highest constitute an agreement to enter into an agreement as the essential terms were yet to be finalized. It is settled law that an agreement to enter into an agreement is not enforceable. Mr.Trivedi was unable to respond this situation.

28. In view of what is held above, there is no question of waiver on the part of the Defendant. However, since the question was argued de hors sub-clause 2 of the premium payment clause, it is necessary to deal with the same.

29. Mr.Trivedi contended that the first instalment of Rs.4387.50 was accepted without demur. The Defendant did not inform the Plaintiff about any short-fall. The receipt issued by the Defendant upon receipt of the last instalment in fact mentions the policy number as well. Therefore, he contended that

the amounts were not only received but even the policy number was given.

30. He further stated that the cheque dated 26.11.1981 was posted under cover of a letter of that date. Mr.Dubash did cross-examine the witness regarding the same. But, to my mind, the Plaintiff has successfully established that the letter dated 26.11.1981 was in fact posted. The witness has, in his examination-in-chief, categorically stated that the last two instalments of premium were paid on 26.11.1981 by one cheque and sent by post by him with the covering letter. He does not state in his examination-in-chief the date on which the cheque was posted. He was cross-examined on the date of posting. In paragraph 44 of the cross-examination, he stated that he posted the letter on the morning of 26.11.1981. He admitted that he had some acknowledgement of the fact of his having posted the letter. He however stated that he did not on that date have the acknowledgement. He stated that he was therefore unable to produce the same. He was then asked whether he had any proof of the date of receipt of the letter. He however stated that he did not have any proof of the date of the receipt of the

letter by the Defendant. It is too much of a coincidence that the witness has now neither the acknowledgment in proof of his having posted the letter nor an acknowledgement of the Defendant having received the letter. Let me hasten to clarify that the fact that the letter was written and the fact that the Defendant received the same is not in dispute. The question in dispute is the date on which the letter was posted and the date on which it was received.

31. In the circumstances, it is difficult to accept, without anything more, the Plaintiff's case that the letter was in fact posted on 26.11.1981 and received by the end of November, 1981. It is to be remembered that the vessel sunk on 30.11.1981. It is true that the Defendant also had not adduced any evidence regarding the date of receipt of the letter. This is an issue on which both the parties could have adduced evidence but did not. The matter however does not rest there. As far as the plea of waiver is concerned, Mr.Trivedi's contention is that the letter and the payment enclosed therewith must have been received by 30.11.1981. Let me for a moment assume that he is correct in this submission. Let me assume

that the Defendant has not established that the letter was, in fact, received on 4th November, 1981. The fact is that the Defendant accepted the letter and the payment for at least six months. However, that does not carry the Plaintiff's case on waiver any further. Waiver is an intentional relinquishment of a known right. The Defendant's right, in the absence of the said sub-clause 2, was to repudiate the contract of insurance, I will assume. Mr.Trivedi was unable to establish that the Defendant knew actually what right it was waiving. Mr.Trivedi tried to establish that the Plaintiff was aware of the loss of the vessel on 2nd December, 1981. This, he stated on the basis of the witness's evidence that the Defendant was informed of the loss of the vessel by the telegram dated 2.12.1981. I will assume for a moment that the telegram dated 2.12.1981 was in fact sent by the Plaintiff. It is however important to note that this telegram was sent to the Bombay office of the Plaintiff. All aspects concerning the suit policy were arrived at and through the Mangalore office. There was no justifiable reason for the Plaintiff to have sent the telegram to the Defendant's Bombay office. The letter dated 26.11.1981 was also sent to the Mangalore office.

Why then did the Plaintiff send the telegram dated 2.12.1981 to the Bombay office ?

32. When cross-examined on this point, the witness stated that the telegram was addressed to the Bombay office of the Defendant as he did not have the address of the Defendant's Mangalore office. In any event, the cheque was realised by the Mangalore office of the Defendant without any knowledge of the loss of the said vessel. Upon realizing the above facts, the Defendant by its letter dated 20.5.1982 returned the aforesaid cheque. In fact, in view of the said sub-clause 2 of the premium payment clause, it was not even necessary for the Defendant to return the same. It is further pertinent to note that there is not a single document evidencing the Plaintiff's case that subsequently the Plaintiff informed the Mangalore office also about the loss of the vessel.

33. Mr.Trivedi relied upon the judgment of the Division Bench of this Court in *Bhika Cullianji and Company v. Avon Electric Company & Ors. 1995(1) Bombay Cases Reporter, 377*, which is of no assistance to him. The Division Bench held that the challenge to oral evidence must be reflected in the course of

cross-examination. If the defendants decline to put the essential material setting out their case in cross-examination, it would have to be regarded virtually as an admission and that such uncontroverted evidence must be acted upon by the Court.

34. In the present case, however, Mr.Dubash had clearly cross-examined the witness on all the material aspects which the Plaintiff seeks to press into service on the question of waiver. Indeed, he has even challenged in cross-examination the witness's statement to the effect that he mailed the said letter dated 26.11.1981 and the said telegram dated 2.12.1981.

35. Mr.Dubash relied upon the judgment of the Supreme Court in *Associated Hotels of India Ltd. v. S.B.Sardar Ranjit Singh, A.I.R. 1968 Supeme Court, 933* on the question of waiver. The Supreme Court held thus :

> "(14) It is argued that the respondent waived the requirement of consent to the sub-letting. Any sub-letting in breach of the provisions of

> Cl.(b) of the proviso to S.13(1) is an offence punishable under S.44. Assuming that the landlord can waive the requirement as to consent, it is not shown that the respondent waived it. A waiver is an intentional relinquishment of a known right. There can be no waiver unless the person against whom the waiver is claimed had full knowledge of his rights and of facts enabling him to take effectual action for the enforcement of such rights. See Dhanukdhari Singh v. Nathima Sahu, (1907) 7 Cal WN 848 at p.852. It is said that the respondent knew of the sub-lettings as he frequently visited the hotel. It appears that he visited the hotel up to 1953 and he must have known of the occupation of R.N.Kapoor Indian Art Emporium and Pan American World Airways. But he came to know of the other lettings in January 1958 only. Moreover, the precise nature of the grant was never communicated to the respondent. The Courts below rightly held that the respondent did not waive his right to evict the appellant on the grounds mentioned in Cls. (b) and (c) of the proviso to S.13(1)."

36. The judgment applies to the facts of this case. The evidence adduced by the Plaintiff falls far short of the requirements of waiver. The Plaintiff has far from established that the Defendant was aware of the accident and that despite being aware of the accident

it decided to retain the payment of the last instalment.

37. As I have observed earlier, it is also difficult to accept the Plaintiff's case that the cheque itself had been received prior to the date of the accident i.e. 30.11.1981. I have already referred to the cross-examination of the witness where he stated that though he had at one time in his possession, an acknowledgment of the posting as well as of the receipt of the letter dated 26.11.1981, he did not at the time of evidence, have the same. In this regard, it is pertinent to note that even in the affidavit of documents the Plaintiff did not disclose the acknowledgment nor did she state that the acknowledgment was available with her but that on the date of the making of the affidavit, it had been misplaced or lost. In the circumstances, even on facts, it is difficult to accept the Plaintiff's case that the cheque was sent prior to the date of the accident. The only manner in which the Plaintiff sought to prove his case is by his so-called experience of the Indian Postal Service. I am not inclined to accept this evidence.

38. In the circumstances :-

Issue No.1 is answered in the negative.

Issue No.2 is answered in the negative.

Issue No.3 is answered in the negative.

Issue No.6 is answered in the affirmative.

Issue No.7 is answered in the affirmative.

ISSUE NO.4

39. Mr.Trivedi placed reliance upon the surveyor's report for two reasons. Firstly, he relied upon the report to establish the quantum of salvage. He also relied upon the same in support of his argument on waiver contending that by accepting the survey report

the Defendant had waived any breach in the payment of premium.

40. The Plaintiff's case regarding the appointment of the surveyors is both confused and self-contradictory at various stages. Her case regarding the appointment of a surveyor is different. Mr.Trivedi started with the Plaintiff's letter dated 25.6.1983 (Exhibit PW-2/M). In this letter, the witness informed the Defendant that one Raman and one Patil, officers of the Defendant, told him to approach M/s.Metcalf and Company for the survey and that Metcalf and Company told her that they had no office in Veraval and Porebunder and, therefore, they asked the witness to call a person from Kandla which the witness found too costly; that he again approached Raman and Patil for any other surveyor and they told him to appoint any surveyor who would be available near the place of the accident and that he accordingly approached M/s.Mathuradas & Damodardas & Company and they issued the survey report.

41. It is important to note a few things about this letter. Firstly, it is not the Plaintiff's case that the aforesaid officers of the Defendant suggested the

name of M/s.Mathuradas & Damodardas & Company. In fact, in paragraph 3 of the plaint the Plaintiff has clearly stated that she appointed the surveyor. It is not the Plaintiff's case in this letter that the survey report was ever sent to the Defendant. There is no satisfactory evidence of this either. None of this is stated in the written statement. The only averment in the written statement is that the Plaintiff arranged for an independent surveyors. It is not her case that she even informed the Defendant that she had decided to appoint M/s.Mathuradas & Damodardas & Company as the surveyor. It is not her case that she informed the Defendant of the surveyor's visit.

42. In his examination-in-chief the witness improves upon the case in Exhibit PW-2/M. He stated that the name of the surveyor was suggested and approved. This is contradictory to his examination-in-chief itself, where a little later he states that the Defendant appointed the surveyors. Neither in the plaint nor in the letter Exh.PW-2/M was this ever the Plaintiff's case. In fact, her case is that she appointed the surveyor. It is for the first time that in paragraph 10 the witness has stated that the

Defendant had appointed the surveyor. Further, in paragraph 51 of the cross-examination, there is yet another case made out. The witness stated that he met Smt.Mhatre and one Sawant as also the said Raman and Patil, all officers of the Defendant. He now stated that the name of the surveyor was suggested by Smt.Mhatre and Mr.Sawant and not by Raman and Patil. Then again he stated that it was Raman and Patil who suggested the name of the surveyors. At the end of the day, he stated that the suggestions were all made orally. Thus, atleast three different cases appear regarding the appointment of the surveyor.

43. The Plaintiff's and her witness' evidence is inconsistent and contradictory regarding the appointment of a surveyor. Looking at the entire evidence, it is quite clear that the Plaintiff merely appointed M/s.Mathuradas & Damodardas & Company as the surveyors on her own. The surveyors carried out the survey in the absence of the Defendant. No notice of the surveyor's visit was ever given to the Defendants. It is clear therefore that the survey was done behind the back of the Defendant. The Plaintiff has therefore not proved the validity or the authenticity of the survey. Nor has she proved

the contents of the survey report.

44. In fact, Mr.Dubash, in his cross-examination, exposed the fact that the surveyors were closely connected to the Plaintiff.

45. In paragraph 50, 52 and 55 of the cross-examination, the witness admitted that Lodhari & Brothers were the clearing agents of the Plaintiff at the relevant time in Porbunder and that they were clearing agents for his family for many years prior to the loss of the said vessel. He admitted that one Jethalal L. Lodhari is the relative of the partners of the Plaintiff's clearing agents Lodhari Brothers. Jethalal L. Lodhari was the representative of the surveyor.

46. Further, it is clear that even the valuation of the sale of the salvage material was behind the back of the Defendant. Mr.Dubash invited the witness's attention to paragraph 6 of his affidavit in lieu of examination-in-chief where the witness has stated that as per the instructions of the said surveyor on behalf of the Defendant they had carried out salvage operation and could recover machine of the vessels

and other parts from the sea. It was further stated by the witness that these items were sold as per the instructions of the surveyor which he received from the Defendant and realized Rs.34,100/-. In the cross-examination, the witness admitted that he did not know whether the surveyor received the alleged instructions from the Defendant in writing or orally. The surveyor has not been examined. The witness was not able to prove the payment of Rs.7,000/- to the persons for salvaging the vessel. The sale of the salvage items was also behind the Defendant's back. The witness stated that the sale was as per the instructions of the surveyor. He stated that he was not in possession of any documents to prove the invitation for bids or even the bids. There is no evidence to suggest that the Defendants gave any instructions to the surveyors regarding the salvage or the sale thereof.

Issue No.4 is therefore answered in the negative to wit, the Plaintiff has not established the extent or the value of the salvaged material.

ISSUE NO.5

Issue No.5 is answered in the negative.

ISSUE NO.8

The suit is dismissed. The Plaintiff shall pay to the Defendant the costs of the suit to be quantified as per rules.

Parties to act on an ordinary copy of this order duly authenticated by the Associate/Court Stenographer.